

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2003

8  
9 (Argued: May 26, 2004

Decided: December 6 , 2004)

10  
11 Docket No. 03-0050

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13  
14 SHABAKA SHAKUR,

15  
16 *Plaintiff-Appellant,*

17  
18 –v.–

19  
20 DONALD SELSKY, Director of Special Housing, JAMES CONWAY, First Deputy  
21 Superintendent of Attica, T. STICHT, Captain, R. T. LOMANTO, DANIEL HURLBURT,  
22 Correctional Officer, P. FOLEY, Correction Officer, BEYLER, Correction Officer, R. STACK,  
23 Correction Officer, T. STEELE, Correction Officer DOLAN, Hearing Officer, CAROL  
24 EDWARDS, Hearing Officer; sued in their individual and official capacities,

25  
26 *Defendants-Appellees.*

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29  
30 Before:

31 SACK, SOTOMAYOR, and WESLEY, *Circuit Judges.*

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33 Appeal from an order of the United States District Court for the Western District of New  
34 York (Siragusa, J.), entered on December 12, 2002, that *sua sponte* dismissed plaintiff-  
35 appellant's complaint with prejudice.

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37 AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

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41 GARGI PAHUJA, KEITH HOVEY (Jon Romberg, *of counsel*), Seton Hall University  
42 School of Law, Center for Social Justice, Newark, New Jersey, *for*  
43 *Plaintiff-Appellant.*

1 MARTIN A. HOTVET, Assistant Solicitor General of the State of New York (Eliot  
2 Spitzer, Attorney General, *on the brief*, Daniel Smirlock, Deputy Solicitor  
3 General, *of counsel*), Albany, New York, *for Amicus Curiae Eliot Spitzer,*  
4 *Attorney General of the State of New York.*  
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8 WESLEY, *Circuit Judge*:

9 This 42 U.S.C. § 1983 (Supp. I 2002) action involves a prisoner’s claims of infringement  
10 of his free speech, free exercise, due process, and equal protection rights under the Constitution,  
11 and of his rights under the Religious Land Use and Institutionalized Persons Act of 2000  
12 (RLUIPA), 42 U.S.C. § 2000cc. The free speech, due process, and equal protection claims stem  
13 from confiscations of the prisoner’s “New Afrikan political literature.” The free exercise and  
14 RLUIPA claims arise from the alleged denial of the prisoner’s opportunity to attend the Eid ul  
15 Fitr feast, a Muslim holiday. The prisoner filed his action *pro se* and, before defendants were  
16 served, the district court dismissed the complaint in its entirety with prejudice under 28 U.S.C.  
17 § 1915A (Supp. I 2002). We affirm the district court’s dismissal of the due process and equal  
18 protection claims under § 1915A, but vacate the dismissal of the free speech and free exercise  
19 claims, as well as the RLUIPA claim.

20 **BACKGROUND**

21 Plaintiff-appellant Shabaka Shakur filed a *pro se* complaint in the United States District  
22 Court for the Western District of New York. He was and remains in the custody of the New  
23 York State Department of Correctional Services (DOCS). Shakur appeals from the district  
24 court’s dismissal of his complaint. The following are the “facts” as alleged in the complaint.  
25 *See, e.g., Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004).

1           1. The Christmas Eve Confiscation, 1999

2           In 1999, Shakur spent Christmas Eve in a Special Housing Unit (SHU) at Great Meadows  
3       Correctional Facility as the subject of a facility investigation. Defendant Hurlburt, a Great  
4       Meadows correctional officer, searched Shakur's property and discovered and then confiscated  
5       26 books and pamphlets of "New Afrikan political literature," which he characterized as "Nubian  
6       gang materials." On Christmas Day, Shakur received an inmate misbehavior report charging him  
7       with possession of "gang material[s]" in violation of DOCS Institutional Rule of Conduct  
8       105.12. Rule 105.12 provides that "[i]nmates shall not ... possess ... or use unauthorized  
9       organizational insignia or materials." N.Y. Comp. Codes. R. & Regs. tit. 7, § 270.2(B)(6)(iii)  
10      (2004). "An unauthorized organization," under Rule 105.12, "is any gang or any organization  
11      which has not been approved by the deputy commissioner for program services." *Id.*

12          Shakur was given a hearing by Defendant Dolan, a Great Meadows correctional officer,  
13      on the Rule 105.12 charge. Hurlburt testified that the confiscated materials were anti-  
14      establishment and anti-democracy; Shakur argued that they were simply political tracts and were  
15      not gang-related. Dolan found that the materials referred to a "revolutionary" organization  
16      "designed to create ... and mobilize a well-armed war movement." He then determined that the  
17      organization was not authorized by DOCS and thus found Shakur guilty of a Rule 105.12  
18      violation, imposing a penalty of 18 months in SHU. Shakur appealed the disposition to  
19      Defendant Selsky, the DOCS Director of Special Housing, who decreased the penalty to 12  
20      months.

21          During his hearing, Shakur requested that Dolan forward the confiscated materials to  
22      Great Meadow's Facility Media Review Committee (FMRC), a committee that reviews inmate

1 literature pursuant to established guidelines. N.Y. Comp. Codes. R. & Regs. tit. 7, §§ 712.2-  
2 712.3. New York regulations provide that “[i]t is departmental policy to encourage inmates to  
3 read publications from varied sources,” *id.* § 712.1(a), but that “[w]hen there is a good faith  
4 belief that a publication ... in [the] possession of an inmate violates one or more of the media  
5 review guidelines, said publication shall be confiscated and referred to the FMRC for review and  
6 decision,” *id.* § 712.3(b)(2). Neither Dolan nor Selsky referred Shakur’s materials to the FMRC.

7 2. The January 2, 2002 Confiscation

8 Two years later, on January 2, 2002, Defendant Foley, a correctional officer at the Attica  
9 Correctional Facility, searched Shakur.<sup>1</sup> He found and confiscated materials he characterized as  
10 a “New Afrikan Self Development Program.” Shakur again requested that these materials be  
11 sent to the FMRC; Foley declined to do so. Instead, Foley filed a report charging Shakur with a  
12 second Rule 105.12 violation.

13 Defendant Lomanto, a Lieutenant, gave Shakur a hearing on this second Rule 105.12  
14 charge, determined that Shakur’s materials were “from a group that is not authorized,” and found  
15 Shakur in violation of the rule, imposing a penalty of thirty days in keeplock. Shakur appealed  
16 the disposition on the grounds that Foley had failed to send the materials to the FMRC, that Rule  
17 105.12 did not apply to his literature, and that Rule 105.12 was unconstitutionally vague.  
18 Defendant Conway, First Deputy Superintendent at Attica, found no error in the hearing.  
19 Shakur then filed an Article 78 petition. *See* N.Y. C.P.L.R. § 7801 (Consol. 1994). The New  
20 York Supreme Court, Appellate Division, confirmed the DOCS determination and dismissed the  
21 petition. *See Matter of Shakur v. Goord*, 306 A.D.2d 958 (4th Dep’t 2003).

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<sup>1</sup> DOCS transferred Shakur to Attica in October 2000.

1           3.     The Eid ul Fitr Feast, 2002

2           Shakur also contends that he was prevented from attending an important religious feast  
3 held at Attica on January 19, 2002. Shakur does not name the religious feast in his complaint,  
4 but on appeal claims that it was Eid ul Fitr. Shakur asserts that he was scheduled to attend but  
5 that Defendant Beyler, an Attica officer, prevented him from participating in the feast and from  
6 receiving a “required” meal. Shakur filed a grievance with the Inmate Grievance Resolution  
7 Committee and asked that “Beyler’s malicious and intentional failure to perform his duties ... be  
8 reprimanded.” The committee found that Beyler should have released Shakur for the event.  
9 Conway reversed that finding and the Central Officer Review Committee affirmed Conway’s  
10 determination.

11           4.     The Summer Confiscations and FMRC Review, 2002

12           In July, Defendant Stack, a correctional officer at Attica, searched Shakur’s cell and  
13 confiscated 17 pages of additional “New Afrikan” materials that he characterized as  
14 “unauthorized gang materials.” Shakur requested that the materials be sent to the FMRC and  
15 Stack refused. Stack charged Shakur with a third Rule 105.12 violation.

16           Defendant Sticht, a Captain at Attica, gave Shakur a hearing on this third Rule 105.12  
17 charge. Shakur argued that the materials should be sent to the FMRC and requested that Stack  
18 appear as a witness. Sticht adjourned the hearing to review the materials and to secure Stack’s  
19 appearance. Upon reconvening the hearing, Sticht found Shakur guilty of violating Rule 105.12.  
20 Sticht found that the “‘New Afrikan Program’ [literature] talks about ... overthrow[ing] and  
21 ‘liberat[ing]’ parts of the U.S. for th[e] group’s own country,” and that the group was “not  
22 authorized by DOCS and is therefore an unauthorized group.” Sticht imposed a penalty of 60

1 days in keeplock. Selsky affirmed the disposition.

2 In August, Foley again searched Shakur's property, found more "New Afrikan literature,"  
3 and confiscated it. Foley ordered Shakur to destroy the literature, but Shakur refused and  
4 requested that it be sent to the FMRC. The Sergeant on Shakur's block granted the request. The  
5 FMRC reviewed these materials, found that three pages contained drawings that would "incite  
6 disobedience and violence," and approved the remainder of the literature. The materials were  
7 returned to Shakur with the objectionable portions redacted.

8 5. Shakur's Complaint

9 Shakur filed a complaint in late November 2002. On the basis of the above factual  
10 recitation, Shakur alleged, *inter alia*, violations of (1) the Freedom of Speech Clause of the First  
11 Amendment; (2) the Due Process Clause of the Fourteenth Amendment; (3) the Equal Protection  
12 Clause of the Fourteenth Amendment; and (4) both the Free Exercise Clause of the First  
13 Amendment and RLUIPA. Shakur's complaint contained other claims not the subject of this  
14 appeal. The district court dismissed Shakur's complaint with prejudice *sua sponte* pursuant to 28  
15 U.S.C. §§ 1915A before the service of process on any defendant. The district court explained the  
16 reasons for its dismissal in an opinion dated December 10, 2002.

17 The district court first considered Shakur's claim that defendants violated what Shakur  
18 characterized as his rights "to freedom of political expression" and "to hold and express political  
19 beliefs." Shakur alleged that defendants violated these rights by improperly confiscating his  
20 "New Afrikan political literature." The district court disagreed. It noted that "[t]he New African  
21 organization, also known as the New African Liberation Movement (NALM), is a group which  
22 has been identified as an unauthorized organization by ... [DOCS], and this identification by

DOCS has been upheld in federal court as reasonably related to legitimate penological objectives.” Citing *Duamutef v. Moran*, 1998 WL 166838 (N.D.N.Y. Apr. 7, 1998) (Pooler, J.) (*Duamutef I*) and *Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002) (*Duamutef II*), the court held that “it has already been settled that the limitations imposed in the New York State prison system on written materials related to the New African Liberation Movement comport with First Amendment requirements.”

The district court then considered Shakur’s claim that defendants denied him due process. The court held that “[t]o the extent the claim is that the materials should have be [sic] reviewed by the FMRC, the claim fails because DOCS had already determined that the New African organization is not authorized, and thus the possession of any written materials related to it are, *a priori*, a violation of prison rules.” The court held further that “[t]o the extent that ... plaintiff [claims to have] been deprived of written materials in which he has [a] property interest,” such a deprivation “was not without due process of law because New York provides an adequate post-deprivation remedy” in the form of an Article 78 proceeding.

The district court also examined Shakur’s equal protection claim. Shakur alleged that defendants “in subjecting plaintiff to continuous searches, confiscations and punishment in clear disregard to plaintiffs [sic] constitutional rights evidence a pattern of political and racial discrimination in violation of the Equal Protection clause of the 14th amendment.” The district court found that Shakur failed to allege either “that other inmates who possessed materials related to an unauthorized organization were treated differently” than he or that defendants had disciplined him “based on impermissible considerations.” The court thus found no ground for an equal protection claim.

1 Finally, the district court considered Shakur's claim that Beyler violated Shakur's right  
2 "to freely exercise his religious belief" by preventing him from attending the January 19 religious  
3 feast that Shakur now contends was Eid ul Fitr. The district court cited *Ford v. McGinnis*, 230 F.  
4 Supp. 2d 338 (S.D.N.Y. 2002), for the proposition that "a denial of a single religious meal is a *de*  
5 *minimis* burden on the free exercise of religions and, as such, is not of constitutional dimension."  
6 The court likewise concluded that the fact that Shakur missed "a single religious feast simply  
7 does not amount to a 'substantial burden' on his religious exercise" under RLUIPA.  
8 Accordingly, the court concluded that Shakur failed to state a claim for a violation of either the  
9 Free Exercise Clause of the First Amendment or RLUIPA.

10 The district court entered an order dismissing Shakur's complaint with prejudice. Shakur  
11 filed a notice of appeal and moved for *in forma pauperis* status. This Court granted Shakur's  
12 motion and assigned *pro bono* counsel.<sup>2</sup> The Office of the Attorney General of the State of the  
13 New York submitted a brief as amicus curiae.

## 14 DISCUSSION

15 We review the district court's § 1915A dismissal of Shakur's complaint *de novo*. See  
16 *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999). Section 1915A provides:

### 17 § 1915A. Screening

18 (a) SCREENING. – The court shall review, before docketing, if feasible or, in any event, as  
19 soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks  
20 redress from a governmental entity or officer or employee of a governmental entity.

21 (b) GROUNDS FOR DISMISSAL. – On review, the court shall identify cognizable claims or  
22 dismiss the complaint, or any portion of the complaint, if the complaint –

23 (1) is frivolous, malicious, or fails to state a claim upon which relief may be

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<sup>2</sup> We ordered that assigned counsel brief both Shakur's appeal and the appeal in *Ish Yerushalayim v. United States Dep't of Corrs.*, 374 F.3d 89 (2d Cir. 2004) (per curiam), as the appeals involved substantially similar questions.



1 granted ....

2 28 U.S.C. § 1915A(a)-(b).

3 The court also cited 28 U.S.C. § 1915(e)(2)(B)(ii) as a statutory predicate for its dismissal  
4 of the complaint. Section 1915 governs proceedings *in forma pauperis*, while § 1915A  
5 “appl[ies] to all civil complaints brought by prisoners against governmental officials or entities  
6 regardless of whether the prisoner has paid [a] filing fee.” *Carr v. Dvorin*, 171 F.3d 115, 116 (2d  
7 Cir. 1999) (per curiam). Sections 1915 and 1915A recite identical grounds for dismissal,  
8 *compare* 28 U.S.C. § 1915A(b)(1) *with* 28 U.S.C. § 1915(e)(2)(B)(i)-(ii), and we have found  
9 both sections applicable to prisoner proceedings *in forma pauperis*, *see, e.g., Giano v. Goord*,  
10 250 F.3d 146 (2d Cir. 2001) (applying § 1915); *Carr*, 171 F.3d at 116 (applying § 1915A);  
11 *McEachin v. McGuinnis*, 357 F.3d 197, 198 (2d Cir. 2004) (applying both).

12 We limit our review here to § 1915A. The Supreme Court has held that the pre-1996  
13 version of § 1915 did not permit dismissals with prejudice, *see Denton v. Hernandez*, 504 U.S.  
14 25, 34 (1992), and the Fourth and Seventh Circuits have applied that rule to the present § 1915,  
15 *see Nagy v. Butner*, 376 F.3d 252, 258 (4th Cir. 2004); *see also Gladney v. Pendleton Corr.*  
16 *Facility*, 302 F.3d 773, 775 (7th Cir. 2002). We see no need to resolve that question at this time  
17 as § 1915A permits dismissals with prejudice. Although the Supreme Court has not commented  
18 on § 1915A in this regard, both the Seventh and D.C. Circuits agree that § 1915A authorizes  
19 dismissals with prejudice. *See Gladney*, 302 F.3d at 775; *Davis v. District of Columbia*, 158  
20 F.3d 1342, 1349 (D.C. Cir. 1998). We have already tacitly held as much, *see Liner*, 196 F.3d at  
21 133-35, and now abide by that precedent.

22 No portion of a complaint stating “a claim upon which relief may be granted” should be

1 dismissed by the screening mechanism of § 1915A. This ground – legal sufficiency –  
2 “authorizes a court to dismiss a claim on the basis of a dispositive issue of law.” *Neitzke v.*  
3 *Williams*, 490 U.S. 319, 326 (1989) (discussing standard of Federal Rule of Civil Procedure  
4 12(b)(6)). It operates “without regard to whether [a claim] is based on an outlandish legal theory  
5 or on a close but ultimately unavailing one.” *Id.* at 327. “The settled rule is that a complaint  
6 should not be dismissed for failure to state a claim unless it appears beyond doubt that the  
7 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”  
8 *McEachin*, 357 F.3d at 200 (citations and internal quotation marks omitted). In assessing  
9 whether a claim is legally sufficient, “we accept all of the facts alleged in the complaint as true  
10 and draw all inferences in the plaintiff’s favor.” *Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir.  
11 2003) (per curiam). “Further, when the plaintiff proceeds *pro se*, as in this case, a court is  
12 obliged to construe his pleadings liberally, particularly when they allege civil rights violations.”  
13 *McEachin*, 357 F.3d at 200. Liberally construing Shakur’s complaint, we find his free  
14 expression, free exercise, and RLUIPA claims to be legally sufficient, and vacate the district  
15 court’s dismissal with regard to those claims.

16 However, we find that Shakur’s due process allegations fail to state a claim on which  
17 relief may be granted.<sup>3</sup> Moreover, we find them frivolous. A claim “is frivolous where it lacks  
18 an arguable basis either in law or in fact.” *Neitzke*, 490 U.S. at 325. Section 1915A “does not  
19 require that process be served or that the plaintiff be provided an opportunity to respond before  
20 [the] dismissal” of a frivolous claim. *Carr*, 171 F.3d at 116. Accordingly, we affirm the district  
21 court’s *sua sponte* dismissal with regard to Shakur’s due process claim.

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<sup>3</sup> Shakur waived his equal protection claim on appeal. *See infra* Part 3.

1           1.       The Freedom of Speech Claim

2           Shakur’s first claim is that the defendants violated his constitutional right to free  
3           expression. Reading Shakur’s complaint liberally, we find the complaint alleges (1) that Rule  
4           105.12 is unconstitutional, and (2) in the alternative, that Rule 105.12 did not authorize  
5           defendants’ confiscations, and, accordingly, that such confiscations were improperly made for  
6           reasons of personal prejudice as opposed to legitimate penological interests. We hold that  
7           Shakur states a legally sufficient First Amendment claim.

8           “A prison inmate ... retains those First Amendment rights that are not inconsistent with  
9           his status as a prisoner or with the legitimate penological objectives of the corrections system.”  
10          *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir. 1995) (*Senkowski*). “The governing standard is  
11          one of reasonableness ....” *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990). “[W]hen a  
12          prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is  
13          reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987).  
14          “The prisoner-plaintiff bears the burden of proving that [a] disputed regulation is unreasonable.”  
15          *Senkowski*, 54 F.3d at 1054.

16          The reasonableness of a prison regulation is measured by the three-step analysis outlined  
17          by the Supreme Court in *Turner*, 483 U.S. at 89-91. See *Allen v. Coughlin*, 64 F.3d 77, 79 (2d  
18          Cir. 1995). First, we ask “whether the governmental objective underlying the regulations at issue  
19          is legitimate and neutral, and [whether] the regulations are rationally related to that objective.”  
20          *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). Second, we look to see “whether there are  
21          alternative means of exercising the right that remain open to prison inmates.” *Id.* at 417  
22          (citations and internal quotation marks omitted). Third, we examine “the impact that

1 accommodation of the asserted constitutional right will have on others (guards and inmates) in  
2 the prison.” *Id.* at 418.

3 “The first *Turner* factor is multifold.” *Id.* at 414. A governmental objective must be  
4 “legitimate” and “neutral.” *Id.* Conduct expressly aimed at protecting prison security is  
5 “legitimate” beyond question and is in fact “central to all other correctional goals.” *Id.* at 415  
6 (quoting *Pell v. Procunier*, 417 U.S. 817, 823 (1973)). As for neutrality, “[w]here ... prison  
7 administrators draw distinctions between publications solely on the basis of their potential  
8 implications for prison security, the regulations are ‘neutral’ in the technical sense ....” *Id.* at  
9 415-16. However, where “regulations fairly invite[] prison officials and employees to apply their  
10 own personal prejudices and opinions as standards for prisoner ... censorship,” they are  
11 “decidedly not ‘neutral’ in the relevant sense.” *Id.* at 416 n.14 (citations and internal quotation  
12 marks omitted).

13 A legitimate and neutral governmental objective must be rationally related to a challenged  
14 course of action. *Id.* at 414. “Where the regulations at issue concern ... [publications in] prison,  
15 ... a regulation which gives prison authorities broad discretion is appropriate.” *Id.* at 416. It is  
16 rational to censor any materials found “to create an intolerable risk of disorder under the  
17 conditions of a particular prison at a particular time.” *Id.* at 417. The Supreme Court has  
18 permitted censorship of such materials where the censorship occurred via “individualized”  
19 review. *See id.*

20 The second *Turner* prong cautions that, when other avenues for exercising an asserted  
21 right remain available, “courts should defer to the informed discretion of prison officials to gauge  
22 the validity of the regulation.” *Senkowski*, 54 F.3d at 1056. The “right” in question must be

1 viewed “sensibly and expansively,” *Thornburgh*, 490 U.S. at 417, to “allow for flexibility in  
2 determining what qualifies as another means of expression,” *Senkowski*, 54 F.3d at 1055. As far  
3 as the regulation of free expression is concerned, a regulation cannot “deprive prisoners of all  
4 means of expression,” *Turner*, 482 U.S. at 92, and must leave “effective” means for  
5 “substitutable” exercises of expression, *see Allen*, 64 F.3d at 80. But, generally, if a regulation  
6 “permit[s] a broad range of publications to be ... read, this factor is clearly satisfied.”  
7 *Thornburgh*, 490 U.S. at 418.

8 Under the third and final *Turner* factor, the Supreme Court has instructed that, “[w]here  
9 ... the right in question can be exercised only at the cost of significantly less liberty and safety for  
10 everyone else, guards and other prisoners alike, the courts should defer to the informed discretion  
11 of corrections officials.” *Id.* at 418 (internal citations and quotation marks omitted). However,  
12 “the existence of obvious, easy alternatives may be evidence that the regulation is not  
13 reasonable.” *Turner*, 482 U.S. at 90. While “there is no requirement that prison officials adopt  
14 the least restrictive alternative to their preferred policy,” *Senkowski*, 54 F.3d at 1056, “if an  
15 inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de*  
16 *minimis* cost to valid penological interests, a court may consider that as evidence that the  
17 regulation does not satisfy the reasonable relationship standard,” *Turner*, 482 U.S. at 91. “The  
18 degree to which the cost of [an alternative] is burdensome is an issue of fact ....” *Allen*, 64 F.3d  
19 at 81.

20 Shakur has stated a legally sufficient claim that defendants’ confiscation of his New  
21 Afrikan political literature violated the First Amendment. The complaint in this case is akin to  
22 the complaint in *Thomas v. Scully*, 943 F.2d 259 (2d Cir. 1991) (per curiam). In *Thomas*, the

1 plaintiff challenged a prison's confiscation of nude photographs of his girlfriend. *Id.* at 260.  
2 This Court later upheld similar confiscations in *Senkowski*, 54 F.3d at 1057, as reasonable under  
3 *Turner*. However, in *Thomas*, we concluded that, "whatever its merit, the complaint did state a  
4 claim on which relief could be granted." 943 F.2d at 260. The distinction between *Thomas* and  
5 *Senkowski* is that *Senkowski* came to us on summary judgment rather than on a dismissal for  
6 failure to state a legally sufficient claim. At the point of summary judgment, plaintiff had been  
7 able to assemble evidence to attempt to meet his burden of proof, *see Senkowski*, 54 F.3d at  
8 1054, and defendants had been able to articulate rationales for the policy, *see id.* at 1054-55.  
9 This Court could thus "find the government's explanation ... valid and rational," *see id.* at 1055,  
10 and hold that the plaintiff could not meet his burden of proof, *see id.* at 1054. The holding of  
11 *Thomas*, by contrast, indicates that we would not reach such a conclusion on "the face of the  
12 complaint" alone.<sup>4</sup> *Thomas*, 943 F.2d at 260. Likewise, although we are unable now to  
13 determine whether the challenged conduct is reasonable or not, we hold that Shakur has stated a  
14 claim on which relief may be granted.

15 Defendants predicated their confiscations on Rule 105.12. That rule distinguishes  
16 between authorized and unauthorized organizations. N.Y. Comp. Codes. R. & Regs. tit. 7, §  
17 270.2(B)(6)(iii). "An unauthorized organization is any gang or any organization which has not  
18 been approved by the deputy commissioner for program services." *Id.* Rule 105.12 prohibits the  
19 possession of "unauthorized organizational insignia or materials." *Id.* Defendants classified

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<sup>4</sup> "Admittedly, there are regulations so obviously related to legitimate penological concerns that challenges to them may be dismissed ... based simply on an (irrefutable) 'common sense determination.'" *Senkowski*, 54 F.3d at 1059 (Calabresi, J., dissenting). Common sense does not provide us with an irrefutable determination here.

1 Shakur’s New Afrikan political literature as unauthorized organizational materials.

2 On its face, Rule 105.12 appears to ban all literature from outside organizations, unless

3 those organizations have been approved by the deputy commissioner. This regulation would

4 sweep more broadly than the regulations upheld in *Turner*, *Thornburgh*, *Senkowski*, and *Allen*.

5 An across-the-board exclusion of materials of “unauthorized organizations” may not be rationally

6 related to any governmental objective. Assuming that Rule 105.12 is targeted at the legitimate

7 goal of securing prisons, we are not sure how a complete ban on the materials of “unauthorized

8 organizations” is rationally related to that goal. The district court articulated no such

9 relationship, and none appears to us on the face of the regulation.

10 Moreover, Supreme Court precedent suggests that Rule 105.12 may be too broad to meet

11 the *Turner* standard. In *Thornburgh*, the Supreme Court upheld the facial validity of a prison

12 regulation permitting the warden to reject publications pursuant to articulated standards. 490

13 U.S. at 404, 405 n.5. The Court noted that it was “comforted by the *individualized* nature of the

14 determinations required by the regulation,” and that the regulations “expressly reject[ed] certain

15 shortcuts that would lead to *needless exclusions*.” *Id.* at 416-17 (emphases added). Rule 105.12,

16 by contrast, does not provide any standard against which DOCS officials will conduct an

17 individualized review of the publication in question.

18 Indeed, the “needless exclusions” apparently made possible by Rule 105.12 exceed even

19 the exclusions that the Supreme Court suggested would be unconstitutional in *Thornburgh*. In

20 *Thornburgh*, the Supreme Court cited with approval a regulation prohibiting the establishment of

21 an excluded list of subscription publications, suggesting that the “shortcut” of listing banned

22 publications would lead to “needless exclusions.” *Id.* at 417. The shortcut in *Thornburgh*

1 would, by default, subject the universe of publications to individualized review, and ban only a  
2 discrete set of enumerated publications. Rule 105.12 appears to take a much more serious  
3 shortcut. It seems to ban all the publications of unlisted organizations and allow only a discrete  
4 set of enumerated organizational materials. This “shortcut” greatly circumscribes the universe of  
5 reading materials accessible to inmates. It thus appears that Rule 105.12’s ban is not sufficiently  
6 related to any legitimate and neutral penological objective.

7         The second prong of *Turner* may also support Shakur. At this point, we do not know  
8 what alternative avenues exist by which Shakur might exercise his right to free expression.  
9 Defendants were never served in this case and, consequently, have not been asked to explain the  
10 range of materials available to Shakur. Nor do we know how Rule 105.12 has been applied: we  
11 do not know how many materials are considered to be “organizational materials,” how many  
12 organizations are “authorized,” or how difficult it is to obtain such authorization. Thus, we  
13 cannot say that this prong weighs in favor of dismissal.

14         Most clearly, the third *Turner* prong supports Shakur’s argument. There is an obvious  
15 alternative in this case. As Shakur has continually pointed out, DOCS has established an FMRC  
16 in every correctional institution. The purpose of the FMRC is to review inmates’ reading  
17 materials. Shakur thus points to evidence that DOCS might be able to accommodate Shakur’s  
18 rights “at *de minimis* cost to valid penological interests.” *Turner*, 482 U.S. at 91. Indeed, his  
19 final confiscation was subjected to FMRC review, with no obvious harm to penological interests.  
20 While we recognize that forcing an individualized FMRC review of materials might put a strain  
21 on prison resources, *Allen* counsels that the nature of those costs is an issue of fact. *See Allen*, 64  
22 F.3d at 81. In the absence of a determination that the costs are prohibitive – a claim that is



1 somewhat unlikely given that FMRC review procedures are already in place – this third prong  
2 weighs in Shakur’s favor. Thus, with regard to the constitutionality of Rule 105.12, the present  
3 complaint cannot be dismissed on its face because none of the *Turner* factors facially favor  
4 DOCS. *Id.*

5 Shakur also states a legally cognizable claim if we assume that Rule 105.12 did not  
6 authorize the challenged confiscations. The first *Turner* factor requires a “neutral” objective, and  
7 the Supreme Court has distinguished actions pursuant to neutral objectives from actions pursuant  
8 to “personal prejudices.” *See Thornburgh*, 490 U.S. at 416 n.14. Shakur alleges that his Rule  
9 105.12 punishment was “arbitrary and unjustifiable.” We understand Shakur’s complaint  
10 therefore to allege, as he now argues, that the confiscations were made for reasons of “personal  
11 prejudice.”

12 Our precedent indicates that a failure to abide by established procedures or standards can  
13 evince an improper objective. In *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985), this  
14 Court held that a prison official’s failure to adhere to established procedures was evidence that he  
15 was not acting pursuant to a proper penological objective:

16 [The prison official] did not apply the guidelines set forth [in DOCS directives] .... [O]ur  
17 review ... might have been very different had it been reached by reference to those  
18 standards. The DOCS guidelines provide corrections officials great leeway in  
19 determining what literature will be permitted into prison facilities, yet assure that each  
20 decision represents the consensus of a number of penological professionals, rather than  
21 the bias or animosity of a particular official .... [A] decision reached by reference to the[]  
22 substantive and procedural guidelines [of the DOCS directives] will be afforded great  
23 deference by a reviewing court. Where a corrections official chooses to ignore  
24 established standards and procedures, however, he must be prepared to demonstrate that  
25 his decision – reached in consultation with no one, and made in reliance on no more than  
26 his personal beliefs – is supported by reasonable justification.

27 *Id.* at 1036. Although *Abdul Wali* pre-dates the Supreme Court’s establishment of its current

1 “reasonableness” test, *see Turner*, 482 U.S. at 101 n.1 (Stevens, J., concurring in part and  
2 dissenting in part), the evidentiary point of *Abdul Wali* remains applicable.

3 In the absence of Rule 105.12, the challenged confiscations would have been subject to  
4 FMRC review. *See* N.Y. Comp. Codes. R. & Regs. tit. 7, §§ 712.2-712.3. Under *Abdul Wali*,  
5 defendants’ decision to bypass FMRC review suggests that their confiscations were not made  
6 pursuant to legitimate and neutral penological objectives. This conclusion is buttressed by the  
7 fact that an eventual FMRC review of Shakur’s materials – in the single instance where FMRC  
8 review occurred – ended in approval of the vast majority of those materials. We thus hold that, if  
9 Rule 105.12 did not authorize defendants’ confiscations, Shakur’s complaint states a legally  
10 sufficient claim of unconstitutional infringement of his First Amendment right to free expression.

11 For these reasons, we find that Shakur’s claim that the confiscations at issue were  
12 unconstitutional is a claim on which relief could be granted. Although the district court properly  
13 cited *Turner*, *Thornburgh*, and *Allen* as controlling precedent, it ultimately based its dismissal on  
14 *Duamutef II* and *Duamutef I*, and neither case is apposite. The district court cited the *Duamutef*  
15 cases for the proposition that “it has already been settled that the limitations imposed in the New  
16 York State prison system on written materials related to the New African Liberation Movement  
17 comport with First Amendment requirements.” *Duamutef II* and *Duamutef I* do not support that  
18 proposition. Moreover, the complaint only alleges that defendants seized “New Afrikan political  
19 literature,” not “materials related to the New African Liberation Movement.”

20 In *Duamutef II*, this Court considered allegedly arbitrary mail censorship. *See Duamutef*  
21 *II*, 297 F.3d at 110-11. The plaintiff alleged that the defendants had violated the First  
22 Amendment by instituting a “mail watch,” “stopping, opening and reading all non-privileged

1 correspondence.” *Id.* This Court upheld the mail watch as reasonably related to legitimate  
2 penological interests. We noted that the plaintiff “had an extensive disciplinary history involving  
3 prohibited organizational activities,” *id.* at 113, and had recently been disciplined for  
4 “deliberately misaddress[ing] mail containing correspondence advocating violent overthrow of  
5 the government,” *id.* at 110. The misaddressed correspondence included NALM materials. *See*  
6 *id.* at 110. The case, however, did not involve the confiscation of NALM materials. *See id.* at  
7 110. Indeed, the incident triggering the mail watch was the prisoner’s receipt of James Dale  
8 Davidson and Sir William Rees Magg’s economics book “Blood in the Streets: Investment  
9 Profits in a World Gone Mad.” *Id.* at 111. We had no reason to consider the constitutionality of  
10 a ban on unauthorized materials generally or on New Afrikan political literature in particular.  
11 *See id.* at 110, 113. Thus, our holding in *Duamutef II* does not reach Shakur’s claims.

12 *Duamutef I* is as unavailing as *Duamutef II*. Moreover, *Duamutef I*, of course, is not  
13 binding. In *Duamutef I*, the district court considered the confiscation of certain NALM materials.  
14 1998 WL 166838, at \*1. Unlike the district court here, the district court in *Duamutef I* reviewed  
15 all of those materials. *Id.* at \*2. The *Duamutef I* court concluded that seizure of those particular  
16 materials “furthered the legitimate goal of maintaining prison security.” *Id.* at \*2. The court  
17 adopted a magistrate judge’s opinion which assumed, *arguendo*, that NALM was a “nonviolent,”  
18 “legitimate peaceful political movement” that constituted “an acceptable political organization  
19 under prison rules.” *Id.* at \* 3-4. The court did not consider any NALM materials beyond those  
20 before it. It certainly did not consider Shakur’s seized New Afrikan political literature or a ban  
21 on unauthorized materials generally. Consequently, neither *Duamutef II* or *Duamutef I* disposes  
22 of Shakur’s claim. We hold that the district court erred in disposing of Shakur’s free expression

1 claim. We therefore vacate the district court's dismissal of that claim.

2 2. The Procedural Due Process Claim

3 The district court relied on the *Duamutef* cases in dismissing Shakur's procedural due  
4 process claim. Although we disagree with this analysis for the reasons stated above, we affirm  
5 the district court's dismissal.

6 Shakur presents no colorable due process argument. A procedural due process analysis  
7 proceeds with two questions. "[T]he first asks whether there exists a liberty or property interest  
8 which has been interfered with by the State; the second examines whether the procedures  
9 attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrs. v.*  
10 *Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). There are two possible sets of  
11 deprivations in this case. The first consists of the punishments imposed on Shakur, which  
12 included a penalty of 12 months in SHU. The second consists of Shakur's deprivation of his  
13 literature, as his literature constituted a property interest, *see, e.g., Parratt v. Taylor*, 451 U.S.  
14 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986),  
15 and, according to Shakur, a First Amendment liberty interest. Neither deprivation occurred  
16 without due process.

17 Shakur objects *only* to the defendants' failure to invoke FMRC review. He concedes that  
18 "the prison may, consistent with the Due Process clause ... immediately seize any publication  
19 that is suspected as potentially posing a threat to institutional security," and he therefore "does  
20 not object to the immediate seizure of his political material." Instead, he contests what he terms  
21 "the entirely inadequate subsequent final process." The only procedural protection that Shakur  
22 identifies as missing from that process is an FMRC review. Shakur does not challenge this

1 Court’s holding that the ordinary disciplinary procedures of the New York State prison system  
2 comport with the appropriate due process standards outlined in *Wolff v. McDonnell*, 418 U.S.  
3 539 (1974). See *Walker v. Bates*, 23 F.3d 652, 656 (2d Cir. 1994).

4 Shakur’s allegation that defendants deviated from FMRC procedures is unavailing. We  
5 confronted an analogous question in *Holcomb v. Lykens*, 337 F.3d 217 (2d Cir. 2003). In  
6 *Holcomb*, the plaintiff “assert[ed] that he was deprived of his Fourteenth Amendment procedural  
7 due process rights when Vermont state corrections officers revoked his extended furlough  
8 without following the procedures” required by state law.<sup>5</sup> *Id.* at 220. Holcomb brought a § 1983  
9 action, claiming that defendants’ failure to follow mandatory procedures denied him due process.  
10 *Id.* at 224. This Court affirmed the district court’s grant of summary judgment to the Vermont  
11 officers. *Id.* at 220, 224-25. We explained that the **only** relevant inquiry was whether the  
12 constitutional “minimal procedure[s] for revocation of parole” were met, not whether state  
13 procedures were followed:

14 Although for purposes of his *state* habeas petition the question was whether Holcomb  
15 received an appropriate sanction under *state* law, for purposes of his *federal* procedural  
16 due process claim the question is whether he received the procedural protection mandated  
17 by the federal Constitution.  
18

19 *Id.* at 224 (emphasis in original). Likewise, here, regardless of state procedural guarantees, the  
20 **only** process due an inmate is that minimal process guaranteed by the Constitution, as outlined in  
21 *Wolff*, 418 U.S. at 561-70. “[S]tate statutes do not create federally protected due process  
22 entitlements to specific state-mandated procedures.” *Holcomb*, 227 F.3d at 224.

23 Shakur argues that defendants’ conduct varied egregiously from established guidelines,

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<sup>5</sup> Applicable state regulations define “extended furlough” as “approved absence from a facility for 15 or more consecutive days and nights.” *Id.* at 218 n.1.

1 citing *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000), for the proposition that “[t]his Court has held  
2 that a glaring variation from [prison] regulations violates Due Process.” Shakur misreads *Tellier*.  
3 In *Tellier*, the plaintiff was placed in SHU without a hearing. *See Tellier*, 280 F.3d at 75. There  
4 was no question that the protections outlined in *Wolff* were withheld. “The [officer] never told  
5 him why he was in SHU and denied him the opportunity to present evidence or be heard.” *Id.*  
6 The only question was whether Tellier had a liberty interest in being free from the SHU  
7 confinement he served. *See id.* at 79-83. It was in this context that the Court examined the  
8 applicable prison regulations. *Tellier* did not re-examine *Wolff*. The *Wolff* standards guide the  
9 due process analysis here. Under those standards, Shakur received due process, as he concedes.

10 Thus, we find that Shakur fails to present a colorable due process claim and we affirm the  
11 district court’s dismissal of that claim.

### 12 3. The Equal Protection Claim

13 The district court also dismissed Shakur’s equal protection claim. The court explained  
14 that Shakur alleged neither that “other inmates who possessed materials related to an  
15 unauthorized organization were treated differently” nor that he had been disciplined on any  
16 “impermissible considerations.” Shakur does not raise the equal protection claim on appeal. “It  
17 is well established that an argument not raised on appeal is deemed abandoned and lost, and that  
18 a court of appeals will not consider the argument unless it has reason to believe that manifest  
19 injustice would result otherwise.” *United States v. Joyner*, 313 F.3d 40, 44 (2d Cir. 2002)  
20 (citations and internal quotation marks omitted). We therefore affirm the district court’s  
21 dismissal of Shakur’s equal protection claim.

1           4. The Free Exercise & RLUIPA Claims

2           \_\_\_\_\_ Finally, Shakur alleges that defendants’ refusal to allow him to attend a “religious feast”  
3 violated his First Amendment right to the free exercise of his religion and constituted a violation  
4 of RLUIPA. The district court dismissed both of these claims. Shakur **and** the amicus contend  
5 that the district court erred in its analysis. We agree.

6           The district court adopted the reasoning of *Ford*, 230 F. Supp. 2d at 347-48. In *Ford*, the  
7 district court found, *inter alia*, that denying an inmate the Eid ul Fitr feast was merely a *de*  
8 *minimis* – and not a “substantial” – burden, and therefore was not cognizable under our free  
9 exercise jurisprudence. *Id.* at 348 n.10. The district court in this case simply applied *Ford* to  
10 Shakur’s First Amendment free exercise and RLUIPA claims.<sup>6</sup> It held that “[p]laintiff’s missing  
11 of a single religious feast simply does not amount to a ‘substantial burden’ on his religious  
12 exercise.”

13           *Ford* has subsequently been overruled by this Court. *See Ford v. McGinnis*, 352 F.3d 582  
14 (2d Cir. 2003). In reversing the district court’s *Ford* opinion, we applied the substantial burden  
15 test to Ford’s free exercise claim as Ford had not challenged that standard. “Given that fact, and  
16 because we did not benefit from the parties’ briefing on the issue, we ... proceed[ed] ... on the  
17 assumption that the substantial burden test applies.” *Id.* at 592. We explained that Eid ul Fitr “is  
18 one of two major religious observances in Islam.” *Id.* at 584-85. We then stated that we “would  
19 be inclined to hold ... that Ford has established a substantial burden as a matter of law.” *Id.* at  
20 594. Only “[t]he absence of a cross-motion for summary judgment by plaintiff and the

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<sup>6</sup> RLUIPA provides, *inter alia*, that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ....” 42 U.S.C. § 2000cc-1(a).

1     semblance of a disputed factual issue ... prevent[ed] us from holding that plaintiff [was] entitled  
2     to summary judgment.” *Id.*

3             Our decision in *Ford* is controlling here. Under *Ford*, Shakur states free exercise and  
4     RLUIPA claims. Accordingly, we vacate the district court’s dismissal of those claims.

5                             **CONCLUSION**

6             The district court’s order of December 12, 2002 dismissing plaintiff-appellant’s  
7     complaint with prejudice is hereby affirmed with regard to the procedural due process and equal  
8     protection claims, and vacated and remanded for further proceedings with regard to the First  
9     Amendment free speech and free exercise claims and the RLUIPA claim.